Temple Security, Inc. *and* General Service Employees Union, Local No. 73, SEIU, AFL–CIO, CLC *and* Independent Courier Guard Union of America, Party in Interest. Cases 13–CA–33078 and 13–CA–33382

May 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

Upon charges filed December 27, 1994, and May 5, 1995, by General Service Employees Union, Local 73, SEIU, AFL–CIO, CLC (the Charging Party-Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on April 28, 1995, and an amended complaint and notice of hearing on June 28, 1995, against the Respondent, Temple Security, Inc. The amended complaint alleges that the Respondent violated Section 8(a)(5), (3), (2), and (1) of the Act by withdrawing recognition from and refusing to bargain with the Charging Party-Union, conferring recognition upon the Independent Courier Guard Union of America (Independent Courier Guards or Party in Interest) as representative of the unit previously represented by the Charging Party-Union, entering into a collective-bargaining agreement with Independent Courier Guards and giving effect to the union-security provision and dues-checkoff clause contained in the collective-bargaining agreement with Independent Courier Guards. The Respondent filed an answer to the amended complaint admitting certain factual allegations, but denying the commission of any unfair labor practices.

On December 7, 1995, the General Counsel, the Charging Party-Union, the Party in Interest, and the Respondent filed a motion to transfer proceeding to the Board and a stipulation of facts in which they agreed to certain facts relevant to the issues in this proceeding. They also agreed to waive a hearing before an administrative law judge and the issuance of an administrative law judge's decision. On March 12, 1996, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel and the Charging Party-Union filed briefs with the Board, the National Burglar and Fire Alarm Association, National Council of Investigative and Security Services, Brink's, Inc., and the National Association of Security Companies filed amici briefs in support of the Respondent. The Charging Party-Union filed a brief in answer to the amici briefs. On the entire record, the Board makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

In its answer to the amended complaint, the Respondent admits that it is a corporation with an office in Chicago, Illinois, and is engaged in the business of providing guard services. The Respondent further admits that during the calendar year ending December 31, 1994, in the conduct of its guard services business, it provided services valued in excess of $50,000 for enterprises within the State of Illinois that are, in turn, engaged directly in interstate commerce. Accordingly, the Respondent admits, and we find, that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The Charging Party-Union, General Service Employees Union, Local 73, SEIU, AFL–CIO, CLC, and the Party in Interest, Independent Courier Guard Union of America, are both labor organizations within the meaning of Section 2(5) of the Act.

III. THE STIPULATED FACTS

On September 2, 1986, the Respondent and the Charging Party-Union entered into a memorandum of understanding in which the Respondent voluntarily recognized the Charging Party-Union as the sole and exclusive bargaining agent for all of its employees. The Respondent's work force is composed entirely of employees who are classified as guards.[1] The Charging Party-Union is a labor organization which admits to membership employees other than guards.

After 1986, the Respondent and the Charging Party-Union renewed their collective-bargaining agreement every 2 years. The agreement was to continue from year to year unless either party provided at least 60 days' notice of intention to terminate. The parties' most recent agreement was effective from October 1, 1992, through December 31, 1994. At all times until December 31, 1994, the Charging Party-Union acted as the sole and exclusive collective-bargaining representative of the unit employees.

By letter of October 3, 1994, the Charging Party-Union notified the Respondent that it was ready to begin negotiations for a successor contract. In a letter to the

[1] The unit represented by the Charging Party-Union is described as: All full-time and regular part-time watchmen, guards, security guards/officers, sentries, gatemen, roving guards, clock pullers, roundmen, industrial security guards/officers, building security guards/officers, special guards/officers, industrial guards/officers, institutional guards/officers, hospital security guards, airport security officers/guards, commercial guards, patrolmen, walking beatmen, and tenant security; plus working sergeants, working lieutenants, working captains, working dispatchers and supervisory personnel who are permanently assigned to a customer's premises and who work a regular detail of six (6) hours or more per week but excluding security officers in commercial buildings (except where separately contracted by a tenant for work exclusively in the tenant's space) in that area of Chicago bounded by Roosevelt Road on the South, Lake Michigan on the East, Halsted Street on the West and Division Street on the North, and further excluding security employees in apartment buildings over seven stories in height in Cook County.

This unit consists of approximately 45 to 50 guards.

Charging Party-Union dated December 6, 1994, the Respondent acknowledged receipt of the October notice but, citing *Teamsters Local 807 v. NLRB*,[2] stated that it planned to withdraw recognition of the Charging Party-Union as of January 1, 1995, and that it was terminating the collective-bargaining agreement as of December 31, 1994. The Respondent noted that the decision in *Teamsters*, supra, held that an employer could withdraw recognition of a "mixed guard union, i.e., one that admits both guards and non-guards to membership" upon the expiration of the collective-bargaining agreement.

Thereafter, by letter dated January 4, 1995, the Independent Courier Guards/Party in Interest advised the Respondent that it represented a majority of its employees and asked to be recognized as the bargaining representative. On January 9, 1995, the Respondent and the Party in Interest executed a one-page document in which the Respondent voluntarily granted recognition to the Party in Interest for the purpose of collective bargaining on behalf of "all security officers employed by the company." On January 31, 1995, the Respondent and the Party in Interest executed a collective-bargaining agreement covering "[a]ll security officers which shall include full-time and part-time employees." At all times since January 31, 1995, the Party in Interest has acted as the sole and exclusive bargaining agent for those employees.

IV. THE ISSUE AND LEGAL FRAMEWORK

The issue in this proceeding is the interpretation of Section 9(b)(3) of the Act and the continued viability of the Board's decision in *Wells Fargo Corp.*, 270 NLRB 787 (1984).

Section 9(b) of the Act provides in relevant part that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

In *Wells Fargo,* supra, the Board was faced with the question of whether an employer violated its bargaining obligation under Section 8(a)(5) and (1) of the Act by withdrawing recognition from a mixed guard union,[3] which it had voluntarily recognized as representative of its guard employees during a strike following unsuccessful negotiations for a successor agreement. The administrative law judge concluded that the employer was estopped from withdrawing its voluntarily conferred recognition at the time that it did because the employer had not provided any warning to the union or employees that it was contemplating such action, was not prompted to act by valid concerns over conflict of interest or security, and that its discontinuance of the bargaining relationship was based solely on economic considerations. Thus, the judge found that the employer had violated the Act and ordered it to bargain with the union.

A Board majority reversed the judge. The Board stated that the reason Congress enacted Section 9(b)(3), in response to the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.,*[4] was precisely "to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its affiliation with other unions who represent nonguard employees."[5] By requiring the employer to continue to recognize and bargain with the union, the judge was attempting to impose through the remedial process of an unfair labor practice proceeding what the Board is precluded from doing through the representation election processes—that is, impose upon an employer a bargaining partner which may have conflicting interests among the employees it represents. Thus, the Board held that while the employer and union could enter into a valid voluntary collective-bargaining relationship the employer "was privileged to withdraw from the relationship at the time that it chose to do so."[6] The Board dismissed the complaint. On petition for review, the Second Circuit Court of Appeals upheld the Board's decision. *Teamsters Local v. NLRB,* 755 F.2d 5 (2d Cir. 1985), cert. denied 474 U.S. 901 (1985).[7]

V. THE CONTENTIONS OF THE PARTIES

In their briefs, the General Counsel and the Charging Party-Union recognized that *Wells Fargo* provides the governing law, but argue that the case was wrongly decided and should be overruled. They argue essentially that *Wells Fargo* imposes greater restraints on the representational rights of mixed guard unions than Section 9(b)(3) requires and reaches a result contrary to the plain meaning of the statute. They point out that the language of Section 9(b)(3) prohibits only two specific actions: (1) the designation of a unit as appropriate that contains both guards and nonguards, and (2) the certification of a union as the representative of a unit of guards when that union also admits nonguards to membership. Since Section 9(b)(3) is silent with regard to the voluntary creation, establishment, or maintenance of bargaining relationships between employers and mixed guard unions, they contend, there is no reason why such voluntary relationships should be treated any differently from any other collective-bargaining relationship created by voluntary recognition.

[2] Cert. denied 474 U.S. 901 (1985), 755 F.2d 5 (2d Cir. 1985), affg. *Wells Fargo Corp.,* 270 NLRB 787 (1984).

[3] A mixed guard union is one which, as described in Sec. 9(b)(3), represents or seeks to represent guards, and admits nonguards to membership or is affiliated with an organization which admits nonguards to membership.

[4] 331 U.S. 416 (1947).

[5] 270 NLRB at 789.

[6] Id. at 790.

[7] Our colleagues rely on the dissenting opinion, which said inter alia that Congress did not intend to "outlaw" a mixed guard union's representation of a unit of guards. We note, however, that neither that case nor this one deals with the legality of such representation.

Absent circumstances not here alleged to be present, a voluntarily recognized bargaining representative enjoys a rebuttable presumption of continuing majority following expiration of a collective-bargaining agreement, and it is a violation of Section 8(a)(5) and (1) of the Act for an employer to withdraw recognition from a union simply because the contract has expired.[8] Thus, the General Counsel and Charging Party-Union contend that the Respondent violated Section 8(a)(5) and (1) when it ceased recognizing the Charging Party-Union and taking the other actions alleged in the complaint. They do not, however, allege that the Respondent's subsequent actions in recognizing the Party in Interest and entering into a collective-bargaining agreement with it would be a violation of the Act if the Board declines to overrule *Wells Fargo* and deems the Respondent's termination of the bargaining relationship with the Charging Party-Union to be lawful.

The amici briefs note that the Respondent acted within the parameters of the Act and established case law in withdrawing recognition from the Charging Party-Union upon the termination of the parties' collective-bargaining agreement. By bringing complaint against the Respondent for these actions, they contend, the General Counsel is seeking an unwarranted retroactive application of a change in the law.

They argue that, if the Board were to overrule *Wells Fargo*, it would serve only to discourage employers from voluntarily recognizing and forming bargaining relationships with mixed guard unions who enjoy majority employee support at a time when no divided loyalty problems exist, and could impose deleterious bargaining obligations on employers in the face of a divided loyalty issue, contrary to the intent of Section 9(b)(3) of the Act.

VI. DISCUSSION

As outlined briefly above, the Board in *Wells Fargo* engaged in a thorough review of the very issue presented in this case, analyzing the language of the statute, the legislative history, legal precedent, and the policy and practical implications involved. The court of appeals upheld the Board's decision. Contrary to our dissenting colleagues, we conclude that the Board's legal analysis in that case was correct and that its sound reasoning should continue to apply. Therefore, in reliance on the rationale expressed in that decision, we find that the Respondent acted lawfully when, on the termination of the collective-bargaining agreement, it withdrew recognition from the Charging Party-Union as representative of its employees.[9] Since the complaint's theory for finding that the Respondent acted unlawfully in recognizing the Party in Interest and entering into a collective-bargaining agreement with it rested solely on the argument that the withdrawal of recognition from the Charging-Party Union was unlawful, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBERS FOX AND LIEBMAN, dissenting.

We agree with the well-reasoned dissents of former Board Member Zimmerman and Circuit Judge Mansfield in *Wells Fargo Corp.,* 270 NLRB 787 (1984), petition for rev. dismissed sub nom. *Teamsters Local 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985), cert. denied 474 U.S. 901 (1985). Accordingly, we would overrule that decision and find the violations alleged in the complaint.

In *Wells Fargo*, Member Zimmerman dissented from the Board's "novel but untenably expansive construction of Section 9(b)(3)" (270 NLRB at 790), endorsing the distinction between the Board's certification of a collective-bargaining relationship between a guard employer and a "mixed-guard" union, on the one hand, and the maintenance of such a relationship, on the other. He said, "The result here is not only far beyond either the words of Section 9(b)(3) or its legislative history, it envisions a form of collective bargaining that is foreign to the statute as a whole [and] contrary to the stability of collective-bargaining relationships promoted by the statute." Id. at 793.

On the union's petition for review in *Wells Fargo*, the Second Circuit Court of Appeals upheld the Board's decision over the dissent of Circuit Judge Mansfield. He concluded that the Act does not authorize an employer unilaterally to withdraw recognition of a union with which it has bargained, in that case for over 30 years, because the labor organization is a "mixed guard" union that could not now be certified. In his view, the majority's decision was "not only fundamentally unfair to the employees but contrary to the Act's basic policy of encouraging stability in labor relations." 755 F.2d at 15. As he stated:

> This case of first impression is important since our decision can have a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation . . . who are represented by mixed-guard unions of their own choosing. . . . [T]he Board's action . . . is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act. [Id. at 11.]

Since Section 9(b)(3) prohibits only certification of a mixed guard union, and "guards" still retain rights as

[8] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 78 (1996), and cases there cited.

[9] Our dissenting colleagues rely on cases concerning the general principles regarding withdrawal of recognition. However, none of hese cases involved a withdrawal of recognition from a mixed guard union epresenting a unit of guards.

"employees" under the Act, Judge Mansfield criticized the majority for rewriting the Act by expanding the certification ban beyond its literal language. The majority, he wrote, was "relying on its own *ipse dixit* that 'it is reasonable to infer . . . that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election.' . . . Nothing in the statutory language or decisions under the statute supports that broad statement." Id. at 14. Congress, he said, refused to make certification a prerequisite to the 8(a)(5) duty to bargain or to outlaw "mixed-guard" union representation. Thus, he also endorsed the distinction between creating an initial relationship and maintaining a relationship created by the parties.

The underlying purpose of the Act is to encourage stable labor-management relationships. In furtherance of that purpose, it is general Board policy that an employer which has voluntarily recognized a union must maintain that relationship, absent, at the very least, a good-faith doubt of the union's majority status. An employer has a right, absent the commission of unfair labor practices, to insist on a Board-conducted election before recognizing a union. *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974). But, once it voluntarily recognizes a majority union, no matter how informally, the right is lost. "[O]nce an employer has affirmatively agreed to recognize a union, it cannot change its mind." *NLRB v. Brown & Connolly, Inc.,* 593 F.2d 1373, 1374 (1st Cir. 1979). Once a voluntary bargaining relationship is established, it "must be permitted to continue and recognition may not be withdrawn at will." *NLRB v. A. Lasaponara & Sons, Inc.,* 541 F.2d 992 (2d Cir. 1976), cert. denied 430 U.S. 914 (1977). Moreover, "[v]oluntary recognition is a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.,* 578 F.2d 238, 241 (9th Cir. 1978).

In accordance with these principles, we agree with dissenting Board Member Zimmerman and Circuit Judge Mansfield that a guard employer, having voluntarily entered into a bargaining relationship with a mixed guard union, is estopped from repudiating that relationship. In our view, in rejecting that approach the majority is elevating the narrow purpose of Section 9(b)(3) over the overall purpose of the Act to encourage stable labor relationships. Respectfully, we dissent.